

No. 1-09-3232

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 04 CR 22783
)	
TROY FRIESON,)	Honorable
)	Diane Gordon Cannon,
Defendant-Appellant.)	Judge Presiding.

Justice Murphy delivered the judgment of the court.
Quinn, P.J., and Neville, J., concurred in the judgment.

ORDER

¶1 Held: Summary dismissal of post-conviction petition affirmed over claims that the State offered false testimony at trial, and that trial counsel rendered ineffective assistance where she failed to investigate defendant's proposed alibi defense and forced him to give up his right to testify.

¶2 Defendant Troy Frieson appeals from the summary dismissal of his pro se petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 et seq. (West 2008). He contends that the circuit court erred in dismissing his petition at the first stage of proceedings where he set forth cognizable claims of a due process violation and ineffective assistance of trial counsel.

¶3 The record shows, in relevant part, that following a 2006 jury trial, defendant was convicted of two counts of first degree murder in the shooting death of John Payne, and

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sentenced to concurrent terms of 55 years' imprisonment. On direct appeal, this court vacated one count of first degree murder and its corresponding sentence under the one-act, one-crime rule, and affirmed the judgment in all other respects. *People v. Frieson*, No. 1-07-0181 (2008) (unpublished order under Supreme Court Rule 23).

¶4 The evidence adduced at trial showed that at about 6 p.m. on August 17, 2004, a group of between 10 and 30 people, including defendant and the victim, had been outside partying for a few hours at 68th Place and Hoyne Avenue, in Chicago, when defendant and the victim began arguing over a container of Remy Martin which defendant was "hogging." The argument also involved "something about Bin Laden and guns," and eventually turned physical when defendant started pushing the victim, who asked him to stop. Defendant subsequently left the party in the direction of Damen Avenue, and then returned a few minutes later with a gun and shot the victim in the head.

¶5 On July 28, 2009, defendant filed a pro se "Motion for Discovery and Common Law Records" to support the filing of his post-conviction petition. Then, on August 4, 2009, defendant filed a pro se petition for post-conviction relief alleging, as pertinent to this appeal, that his right to due process was violated where the State presented the false testimony of Jordash Robinson and Tyrone Means at trial. Defendant also alleged that he received ineffective assistance of trial counsel where counsel "[f]orced [a]nd [c]oerced" him into giving up his right to testify, and failed to investigate and present his alibi that he was playing basketball at Marquette Park at the time of the shooting. In support of his allegations, defendant attached six affidavits to his petition, three of which are his own.

¶6 Defendant averred that on the last day of trial, he spoke with counsel in the court bullpen and asked her if he would have an opportunity to testify that he had not killed anyone. Counsel responded that the jury had already made its decision and likely found him guilty, and defendant replied, "[S]o what, I'm still gonna testify." Counsel said, "No you are not," and he replied that

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he "didn't give a damn what she was talking about, I wanted to testify." Counsel told him to consider all the people who had testified against him, and also that he would not want her "against" him since she would be questioning him on the stand, stating, "So your [sic] not testifying, and when the Judge ask [sic] you about testifying, I'm telling you, you say No, and you know your rights." Thereafter, when informing the court that he did not want to testify, defendant lied about having not been threatened since his attorney had threatened "going against" him if he testified. He also lied to the court about knowing of his right to testify, as counsel had never informed him of that right and he first heard of it in court. At the time, he was "confused and without complete understanding" and "scared."

¶7 Defendant further averred that prior to trial, he told counsel that from 5 to 8 p.m. on August 17, 2004, he was playing basketball at Marquette Park with 10 other people, and gave her the address of Jake Brunt who had also been at the park. However, when defendant asked counsel if this alibi would be presented at trial, she stated, "I cannot present your Alibi because of how many witnesses are against you." Defendant nonetheless told her that he had not killed anyone and "wasn't even there." Counsel stated that she did not know what to do with his case, and whenever defendant would give her details regarding where he was at or who he was with, "she acted like she was writing down what I was saying, but really she was just brushing me off."

¶8 Jake Brunt averred that from 5 to 8 or 8:30 p.m. on August 17, 2004, he was playing basketball with defendant at Marquette Park, did not see defendant leave the park during that time, and would have testified to having seen him there that day. He informed defendant's family that defendant had been at the park with him and was told by them that counsel would contact him, but he was never contacted by anyone.

¶9 Tyrone Means averred that on August 17, 2004, he made a statement to police that defendant had shot his good friend John Payne. At first, he told the police that he had not seen the shooter, but then "said yeah" after an officer told him that everyone had said defendant was

the shooter. Although he maintained that he "really wasn't sure," the police made him give his statement despite knowing that he was "drunk and high off somking [sic] marijuana." He wanted to come forward sooner but had been told by the prosecutor "that I couldn't change my story because they needed the conviction," and he would have told counsel everything if she would have spoken to him before he testified.

¶10 Finally, Jordash Robinson averred that on August 17, 2004, he was drinking and smoking marijuana while celebrating his birthday at 68th Street and Hoyne Avenue. When the shooting started, he immediately ducked and did not have an opportunity to see the shooter, but afterwards asked the victim's brother, James, who the shooter was, and James told him that it looked like it had been defendant. Robinson subsequently told police "that Troy was the person that was shooting, based on what James had told me, and I didn't see." The police wanted to take him to the station in their car and searched him before getting in, and, in doing so, they found a half-ounce of marijuana and 40 bags of crack cocaine. The police told him they would not charge him if he would make a statement that he saw defendant shooting, and testify accordingly, so he identified defendant as the shooter to avoid jail.

¶11 On October 14, 2009, the circuit court denied defendant's motion for discovery and common law records, and summarily dismissed his post-conviction petition. In this appeal, defendant solely challenges the dismissal of his post-conviction petition.

¶12 The Act provides a mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. *People v. Delton*, 227 Ill. 2d 247, 253 (2008). At the first stage of proceedings, defendant need only set forth the "gist" of a constitutional claim (*Delton*, 227 Ill. 2d at 254); however, the circuit court must dismiss the petition if it finds that the petition is frivolous or patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2008)), i.e., it has no arguable basis either in law or in fact (*People v. Hodges*, 234 Ill. 2d 1, 16 (2009)). We review the summary dismissal of a post-conviction

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petition de novo. *People v. Coleman*, 183 Ill. 2d 366, 388 (1998).

¶13 Defendant first contends that his right to due process was violated where Means and Robinson provided false testimony identifying defendant as the shooter at the behest of the police and prosecutor. It is well established that a due process violation occurs where the State knowingly uses perjured testimony to obtain a criminal conviction. *People v. Olinger*, 176 Ill. 2d 326, 345 (1997). Such cases are reviewed under a strict standard of materiality whereby the reviewing court must set aside the conviction if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. *Coleman*, 183 Ill. 2d at 392, citing *United States v. Agurs*, 427 U.S. 97, 103 (1976).

¶14 Here, however, the evidence against defendant was overwhelming. Excluding the testimony of Means and Robinson, six other eyewitnesses testified at trial that they saw defendant with a gun. Three of those eyewitnesses, James Payne, Myron Burkes, and Darnell Johnson, testified to having seen defendant shoot the victim. With respect to the other three, Patricia Payne, the victim's mother, testified that she saw defendant raise the gun and call out to the victim by his nickname, then she heard a shot. Tamika Stanton and Roshandra Crawford testified that they heard a shot and drove around the block, then returned to find the victim bleeding. There was thus overwhelming evidence of defendant's guilt to support his conviction apart from the testimony of Means and Robinson, and, consequently, we do not find it reasonably likely that their allegedly false testimony could have affected the judgment of the jury. See *People v. Barrow*, 195 Ill. 2d 506, 532-33 (2001) (defendant failed to show reasonable likelihood that false testimony could have affected the jury's verdict where the evidence of his guilt was overwhelming). Thus, defendant's claim has no arguable basis in law.

¶15 Defendant also maintains that he set forth a claim of ineffective assistance of counsel \ warranting further proceedings under the Act. To establish a claim of ineffective assistance of counsel, defendant must first show that counsel's performance was deficient, i.e., it fell below an

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objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

Secondly, defendant must show that counsel's deficient performance resulted in prejudice to the defense, i.e., a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687, 694. Both prongs of *Strickland* must be satisfied to succeed on a claim of ineffective assistance of counsel. *People v. Flores*, 153 Ill. 2d 264, 283 (1992).

¶16 Defendant first claims that counsel was ineffective for failing to investigate and present his alibi defense that he was playing basketball at the time of the shooting. He calls our attention his own averments and those of Jake Brunt which show that Brunt would have testified that he was playing basketball with defendant at Marquette Park at the time of the shooting, and that defendant had informed counsel of that fact before trial and also given her Brunt's address.

¶17 We recognize the professional obligation of defense counsel to explore and investigate her client's alibi defense. *People v. Morris*, 335 Ill. App. 3d 70, 79 (2002). Notwithstanding, counsel is only under a duty to make reasonable investigations, or a reasonable decision which makes particular investigations unnecessary, and counsel's judgment on those matters is entitled to a heavy measure of deference. *People v. Pecoraro*, 175 Ill. 2d 294, 324 (1997). An attorney is not ineffective in forgoing additional investigation where the circumstances that were known to her did not reveal a sound basis for further inquiry in a particular area. *Pecoraro*, 175 Ill. 2d at 324.

¶18 The record shows that counsel considered presenting defendant's alibi defense that he was playing basketball at the time of the shooting where she filed an amended answer to the State's motion for discovery stating, "The defense may also rely on a defense of alibi in that Troy Frieson was at Marquette Park, 67th and Kedzie, before, during, and after the shooting of John Payne." However, as discussed above, there was ample eyewitness testimony placing defendant at the scene of the shooting and identifying him as the shooter, and defendant's own affidavit

indicates that counsel was aware of this, telling him, "I cannot present your Alibi because of how many witnesses are against you." The shooting occurred during a party attended by 10 to 30 partygoers, and considering the numerous witnesses who could have contradicted defendant's proposed alibi defense, we do not find that counsel rendered ineffective assistance by not interviewing Brunt and further investigating the proposed defense. Pecoraro, 175 Ill. 2d at 324.

¶19 Defendant also claims that counsel rendered ineffective assistance by forcing him to give up his right to testify. The decision of whether to testify ultimately belongs to defendant (*People v. Thompkins*, 161 Ill. 2d 148, 177 (1994)), but should nonetheless be made with the advice of counsel (*People v. Smith*, 176 Ill. 2d 217, 235 (1997)). Advising defendant not to testify is a matter of trial strategy and does not constitute ineffective assistance absent evidence suggesting that counsel refused to allow him to testify. *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2009).

¶20 As an initial matter, the State maintains that defendant's claim must fail because he did not allege in his petition that he made a contemporaneous assertion of his right to testify during trial (*Youngblood*, 389 Ill. App. 3d at 217, quoting *People v. Brown*, 54 Ill. 2d 21, 24 (1973)), and the record shows that he never informed the trial court of his desire to testify (*People v. Davis*, 373 Ill. App. 3d 351 (2007)). However, the State is mistaken with respect to its first assertion in that defendant alleged in his petition that he had a discussion with counsel on September 29, 2006, the third day of trial,¹ in which he stated, "I'm still going to testify," and "I want to testify."

¶21 As to the second assertion made by the State, this court, in *Youngblood*, 389 Ill. App. 3d at 217-18, distinguished *Davis*, which required that the record show that defendant alerted the trial court of his desire to testify, from *Brown*, which required only that defendant inform his attorney of his desire to testify. The court noted that *Davis* involved a claim made by defendant

¹ Defendant alternately refers to this date as "the last day of my trial" in his affidavit.

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on direct appeal that his right to testify was violated, whereas Brown involved an appeal from the dismissal of a post-conviction petition alleging that trial counsel was ineffective for not permitting defendant to testify. Youngblood, 389 Ill. App. 3d at 218. Thus, where, as here, defendant appeals the dismissal of his post-conviction petition alleging that counsel forced him not to testify, Davis is inapposite and the record need not show that defendant informed the trial court of his desire to testify. See Youngblood, 389 Ill. App. 3d at 218.

¶22 Notwithstanding, defendant must still show that he suffered prejudice from being denied his right to testify in order to properly make out a claim of ineffective assistance of counsel. Youngblood, 389 Ill. App. 3d at 218, citing *People v. Madej*, 177 Ill. 2d 116 (1997). We have already noted the overwhelming evidence of defendant's guilt in the form of six eyewitnesses (excepting Means and Robinson) who saw him with a gun, three of whom heard a shot fired thereafter, and the other three having seen defendant shoot the victim. Even assuming defendant's allegations against counsel are true, there is not a reasonable probability, under the circumstances, that the jury would have reached a different verdict if defendant had testified. Strickland, 466 U.S. at 687, 694.

¶23 We also find defendant's reliance on *People v. Dredge*, 148 Ill. App. 3d 911 (1986) unavailing. As this court noted in Youngblood, 389 Ill. App. 3d at 219, the Dredge decision does not indicate whether defendant contemporaneously asserted her right to testify, or whether defendant asserted prejudice, both of which are required. We therefore decline to follow that decision. Youngblood, 389 Ill. App. 3d at 219.

¶24 In sum, we find that defendant has failed to establish that counsel rendered ineffective assistance by not interviewing Brunt and further investigating defendant's proposed alibi defense, or that he suffered prejudice where he was forced by counsel not to testify at trial. We thus conclude that defendant's claims of ineffective assistance of trial counsel must fail. Flores, 153 Ill. 2d at 283.

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¶25 For these reasons, we affirm the summary dismissal of defendant's post-conviction petition by the circuit court of Cook County.

¶26 Affirmed.